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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.184 OF 1989

State of Maharashtra) ... Appellant
(Orig. Complainant)

Versus

1. Vithal Shrirang Lavate,)
age 27 years,)

2. Appa Daji Shinde,)
age 27 years,)

3. Balu Daji Shinde,)
age 20 years,)

4. Tanaji Gena Shinde,)
age 50 years,)

5. Baban Aba Shinde,)
age 22 years.)

All residents of Pirle, Taluka)
Malshiras, District Solapur.) ... Respondents
(Orig. Accused)

Mr. D.S. Mhaispurkar, A.P.P. for the appellant-State.

Mr. T.E. Mane for the respondents-accused.

CORAM: SMT. RANJANA DESAI &
A.S. OKA, JJ.

DATED: 26TH OCTOBER, 2004.

ORAL JUDGMENT:- (**Per Smt. Ranjana Desai, J.**)

1. The respondents (for convenience, accused 1 to 5 respectively) were tried in Sessions Case No.166 of 1988 in the Sessions Court at Solapur for offences punishable under sections 147, 302 read with sections 149 and 323 read with section 149 of the Indian Penal Code (for short, "the IPC"). By the judgment and order dated

28/11/1988, the learned Sessions Judge acquitted the accused of all the charges and, hence, this appeal by the State of Maharashtra.

2. Accused 2 and 3 are the sons of Daji Shinde. Accused 1 is the maternal uncle of accused 2 and 3. Accused 4 is the son of Gena Shinde and accused 5 is a relative of accused 2 and 3.

3. It is an admitted position that the daughter of Daji Shinde is the wife of PW-5 Dhanaji Waghmode. Deceased Shivaji was a cousin of PW-5 Dhanaji Waghmode. According to the prosecution, on 8/5/1988, there was a quarrel between PW-5 Dhanaji Waghmode and deceased Shivaji on the one hand and accused 2 Appa Shinde on the other hand. Accused 2 Appa Shinde had filed a complaint with the police against PW-5 Dhanaji Waghmode and deceased Shivaji. That case is pending. Admittedly, the wife of PW-5 Dhanaji Waghmode was residing with her father Daji Shinde.

4. According to the prosecution, PW-5 Dhanaji Waghmode had been to the house of Daji Shinde on 8/5/1988 to take his wife home. That time, accused 2 Appa Shinde obstructed him and, therefore, he had a quarrel with him. Accused 2 Appa Shinde fell him down and beat him. At that time, deceased Shivaji had rescued him. Deceased Shivaji had beaten accused 2 Appa Shinde. Accused 2 Appa Shinde had filed a case against deceased Shivaji and PW-5

Dhanaji Waghmode. In connection with that case, deceased Shivaji and PW-5 Dhanaji Waghmode were arrested on 11/5/1988 in the morning. On the same day, at about 2.00 p.m., they were released on bail at Malsiras.

5. The prosecution story further goes on to say that PW-5 Dhanaji Waghmode went upto Natepute by S.T. bus and deceased Shivaji went to Natepute on his bicycle. From Natepute, they went to village Pirle on the same bicycle. They reached village Pirle at 8.00 p.m. when they were on their way to the vasti of deceased Shivaji, near Nagichawada, they met the accused. The accused beat deceased Shivaji and PW-5 Dhanaji Waghmode with stones. As a result of which, PW-5 Dhanaji Waghmode received injuries and deceased Shivaji succumbed to the injuries received by him at the hands of the accused. It appears that PW-7 Bharat Waghmode, who is the son of deceased Shivaji went to PW-4 Bhairu Patil, who is the police patil of village Purle and informed him that his father was lying dead near Nagichawada and that he was done to death by the accused. PW-7 Bharat Waghmode then lodged a complaint, which is at Ex-37 on the basis of which, the investigation was started. After completion of the investigation, the accused came to be charged as aforesaid.

6. In support of its case, the prosecution examined as many as 11 witnesses. The prosecution case basically rests on the evidence of the injured witnesses PW-5

Dhanaji Waghmode and PW-7 Bharat Waghmode, the son of deceased Shivaji. The prosecution also examined PW-4 Bhairu Patil, the police patil of village Pirle, who has deposed about lodging of the FIR. The prosecution also examined PW-8 Abba Lavate, who tries to corroborate the evidence of PW-5 Dhanaji Waghmode and PW-7 Bharat Waghmode. PW-6 Dr. Shivgunda Gululdi had done post-mortem on the corpse of Shivaji. He had prepared the post-mortem notes. Details of the investigations have been given by PW-9 PSI Srinivas Kulkarni and PW-10 ASI Sattar Sayyad.

7. The defence of the accused was one of denial. The evidence led by the prosecution did not find favour with the learned Sessions Judge and, therefore, he acquitted the accused as aforesaid.

8. We have heard, at some length, Mr. Mhaispurkar, the learned A.P.P. appearing for the appellant-State in support of the appeal and Mr. Mane, the learned counsel appearing for the respondents-accused. With their assistance, we have gone through the evidence and record of the case. Mr. Mhaispurkar contended that the trial court erred in not placing reliance on the injured witness PW-5 Dhanaji Waghmode, who has given a graphic account of the incident in question. The learned A.P.P. contended that PW-7 Bharat Waghmode, the son of deceased Shivaji has corroborated the evidence of PW-5 Dhanaji Waghmode. He submitted that this witness has no reason

to falsely implicate anyone. The learned A.P.P. submitted that there are minor discrepancies in their evidence which ought to have been ignored. He submitted that the learned Sessions Judge has given undue importance to the minor discrepancies. The learned A.P.P. submitted that the post-mortem notes indicate that the deceased had received injuries on his neck and chest and, therefore, the story that stones were thrown on him ought to have been accepted. The medical evidence supports the ocular account of the incident. In any case, submitted the learned A.P.P., the evidence of PW-4 and PW-5 is consistent as regards involvement of accused 2 Appa Shinde. PW-4 Bhairu has stated that PW-7 Bharat told him that accused 2 and others have killed his father. Therefore, atleast involvement of accused 2 has been made out. He submitted that, therefore, the order of acquittal be overturned and the accused be convicted according to the law and, in any case, this court should convict accused 2.

9. That the relations between the deceased, injured witness PW-5 Dhanaji and the accused were strained, is made out by the prosecution. There was a case registered against PW-5 Dhanaji and the deceased by accused 2 Appa Shinde. It is also true that post-mortem notes do indicate that the deceased appeared to have been crushed to death by throwing stones at him. But that by itself does not establish the prosecution case. In our opinion, the learned Sessions Judge is right in coming to the

conclusion that the prosecution has failed to establish its case because the evidence adduced by the prosecution does not inspire confidence.

10. PW-5 Dhanaji has stated that when he and the deceased were near Nagichawada, accused 2 came there on bicycle and stones were thrown on his head. On account of the impact of stones, he got down from the bicycle and stood by the side of the road. Accused 2 fell the deceased on the ground. At that time, accused 1 Vithal, accused 3 Balu and accused 4 Tanaji and accused 5 Baban came there. Accused 4 and 5 caught hold of both the legs of the deceased. Accused 2 asked accused 4 to release one leg and bring one stone. Accused 2 put the stone brought by accused 4 under the leg of the deceased. Accused 2 hit on the leg of the deceased that was put on a stone with another stone from above. Accused 1 also hit on the same leg with another stone. Accused 4 instigated the other accused saying that the other leg of the deceased is intact. Accused 4 dropped a stone on the other leg of the deceased. On witnessing this incident, PW-5 Dhanaji fell down on the ground. Accused 3 sat on his chest. At that time, PW-7 Bharat gave him water and he became unconscious. After sometime, he regained consciousness. He saw his brother Shivaji lying by the side. He asked PW-7 Bharat to bring a bullock cart to take him to the dispensary. PW-7 Bharat left the place. Thereafter, the accused again came there after an hour. They started hitting on the leg of the deceased with

stones. According to PW-5 Dhanaji, he was frightened and, therefore, he hid himself in the sugar-cane field. In the morning, he saw two persons near the dead body of the deceased. They were unknown to him. He continued to remain in the sugar-cane field. At about 12.30 p.m., when police came there, he came out from the sugar-cane field. He was then referred to the medical officer. In the cross-examination, he has admitted that in his statement recorded by the police, he had not stated that accused 2 Appa had asked accused 4 Tanaji to bring one stone. He also did not state that accused 2 Appa put a stone under the leg of the deceased. He did not state that accused 2 Appa hit on the leg of the deceased that was put on the stone. He also did not state that accused 4 Tanaji instigated the other accused saying that the other leg of the deceased was intact. According to him, he did state before the police that after PW-7 Bharat had left the place, the accused came there and started hitting on the leg of the deceased again and he cannot say why this assertion made by him is not found in the police statement.

11. PW-9 PSI Srinivas Kulkarni has stated that PW-5 Dhanaji did not state that accused 4 hit on the other leg of the deceased with a stone and he did not state that after PW-7 Bharat left the place the accused again came there and hit on the leg of deceased with stones. We find that there are several significant omissions in the evidence of this witness. His story that after PW-7

Bharat had left the place, the accused came again there and started hitting on the leg of the deceased, is totally absent in his police statement. It is also improbable that having hit the deceased in such a brutal manner, the accused would come back to the scene of offence and start throwing stones at the deceased particularly when it is the case of the prosecution that PW-7 Bharat had come on the scene and had left the place. Therefore, there was every possibility of PW-7 Bharat bringing either the police or other persons to the scene of offence. The accused could definitely, therefore, not have come back to the scene of offence and this appears to be a story concocted by this witness. As regards the incident of throwing stones also, there are significant omissions, which we have already noted hereinabove. It also does not stand to reason that this witness would hide in the sugar-cane field and not came out till the police came to the scene of offence in the morning. Normally, one would expect him to rush to the nearby vasti to inform people about the brutal assault on his brother after the accused had left the place. It is also significant to note that he has stated that after the accused left, two other persons came to the place where the deceased was lying. They were unknown to him. It is not understood as to why he did not come out and inform those two persons that his brother was assaulted by the accused.

12. PW-7 Bharat, the son of the deceased, has stated

that on the day of the incident, he had gone to village Pirle for purchasing salt. After purchasing salt, he was on his way back to his house. Near Nagichawada, he waited to ease himself. At that time, his father deceased Shivaji and PW-5 Dhanaji passed on a bicycle in the direction of his vasti. He saw accused 2 coming from the village. Accused 2 threw a stone which hit on the head of PW-5 Dhanaji. Accused 2 fell his father deceased Shivaji on the ground. Accused 4 and accused 5 caught hold of the legs of his father. Accused 2 asked accused 4 to leave the leg of his father and bring a stone. Accused 4 brought a stone and put it near accused 2. That stone was put by accused 2 under the knee of his father. Accused 2 dropped a stone on the knee that was put on the stone. Accused 1 picked up the same stone and dropped it on the knee of his father. Accused 4 stated that the other leg of his father was intact. Thereafter, accused 2 and accused 1, one after the other hit on the knee joint of his father with the stone thrice. After receiving the impact of stone, PW-5 Dhanaji was lying on the ground. Accused 3 sat on his chest. This witness then raised a hue and cry. His father was also shouting. At that time, Shankar Narole and Shivaji Shinde came there. He requested accused 2 not to beat his father. Accused 2 slapped him. Shankar Narole and Shivaji Shinde requested the accused not to beat his father and then left the place. The accused were assaulting his father. His father was also raising hue and cry. At that time, Bhanudas Tambile and Bapu Punekar came there. They

requested the accused not to beat the deceased. Thereafter, the accused left the place. Bhanudas Tambile and Punekar also left the place. Then he went to PW-5 Dhanaji, who was asking for water. He went to the vasti of Shankar Lavate and brought water and gave it to PW-5 Dhanaji. His father asked him to arrange a bullock cart to take them to the dispensary. He went to Bhanudas Lavate and asked him to give the bullock cart. Bhanudas told him that he should take his bullock cart and one bullock and told him that the other bullock was sick. Then he went to Bhanudas Tambile and asked him to give the bullock cart but Bhanudas told him that his bullock was engaged for doing some other work. On the way back, the wife of Dattu Dadas met him. He requested her to give him the bullock cart for taking his injured father to the dispensary. She told him that he should approach Dattu Dadas. He went to the village to see Dattu Dadas but could not find him. When he was returning, Abba Lavate told him that he would bring someone's motorcycle. He went to Kaka Patil's house. Kaka Patil was not there and, therefore, he could not get either his motorcycle or the bullock cart. Dattu Dadas met him in the village. He asked Dattu Dadas about his bullock cart but Dattu Dadas told him that it was too late and the accused would also beat him. Dattu Dadas took him to his house and kept him inside his house. He closed the door from outside. Abba Lavate came there in the morning and woke him up. They started going to his house and when they reached Nagichawada, they did not find PW-5 Dhanaji

there. He found his father lying dead. Thereafter, he went to PW-4 Bhairu Patil and narrated the incident.

13. In his cross-examination, he has stated that he had stated before the police that accused 2 asked accused 4 to leave the leg of the deceased and bring a stone and that accused 4 brought a stone and put it near accused 2 and accused 2 dropped it on the knee of his father. He has also stated that he had stated before the police that accused 1 picked up the same stone and dropped it on the same leg of his father and accused 1 and accused 4 hit on the leg of his father one after the other thrice and he cannot say why these facts are not mentioned in his statement.

14. PW-9 PSI Srinivas Kulkarni has stated that PW-7 Bharat did not state that he saw his father and PW-5 Dhanaji when he was standing near Nagichawada to ease himself and that PW-7 Bharat did not state in his police statement that accused 2 asked accused 4 to leave the leg of the deceased and bring a stone. PW-9 PSI Kulkarni has further stated that PW-7 Bharat did not state that accused 4 brought a stone and put it near accused 2 and accused 2 dropped it on the knee joint of the deceased. He has also stated that PW-7 Bharat did not state in his police statement that accused 4 brought stones and accused 2 put one stone under the knee of Shivaji and dropped other stones on his knee joint. He has also stated that PW-7 Bharat did not state that accused 1

picked up the same stone and dropped it on the leg of the deceased. He has further stated that PW-7 Bharat did not state that accused 1 and accused 4 hit on the leg of the deceased one after the other thrice. All these omissions make the claim of this witness of being the eye-witness to the incident in question shaky.

15. He has admitted that to the south of his house, is Shinde vasti. Grocery shop of Bhimrao Shinde is situated there. If the grocery shop was near his house, it is not understood as to why he would go even beyond Nagichawada to buy salt. In fact, in his police statement, he had not stated that when he was standing near Nagichawada, he saw his father and PW-5 Dhanaji going on a bicycle. His claim that he went to purchase salt itself appears to be not genuine. It is also improbable that if as stated by this witness when the incident was taking place, Shankar Narole, Shivaji Shinde, Bhanudas Tambile and Bapu Punekar had come there, they would be passive onlookers. It was expected that atleast one of them would take some action, rush to the police or rush to the nearby vasti and call the people to intervene. We are unable to accept the story given by PW-7 Bharat that these four persons came there and they told the accused not to beat the deceased and they went away. The conduct of this witness is also rather unnatural. He goes from one house to the other and then finally allows Dattu Dadas to lock him in his house. He sleeps in Dattu Dadas's house till Abba Lavate comes there in the morning and wakes him up. This is an

abnormal conduct. His normal conduct would have been to rush home and tell the members of his family about the incident. Besides, Abba Lavate in his evidence, does not support PW-7 Bharat about his going to Dattu Dadas's house and waking him up. We, therefore, find this witness to be a very unreliable witness. Once we come to the conclusion that the evidence of these two witnesses i.e. PW-5 Dhanaji and PW-7 Bharat cannot be relied upon, the evidence of PW-8 Abba Lavate looses its significance because Abba Lavate does not claim to be an eye-witness. It is significant to note that though it is the prosecution case that blood stained clothes of the accused were recovered from the house of the accused, the panchas have turned hostile. Therefore, that circumstance does not help the prosecution. It is true that PW-4 Bhairu Patil has stated that PW-7 Bharat told him that accused 1 and others had killed his father and the name of accused 1 is also found in the FIR. The learned A.P.P., therefore, urged that atleast accused 1 should be convicted. In the facts of this case, we are unable to do so. When the evidence of both these witnesses is replete with significant omissions and when they are found to have exaggerated the incident to the extent of making it highly improbable, it is difficult to hold that the prosecution has made out a case against accused 1. In the facts of this case, it is not possible for us to segregate only a part of the evidence and find it to be truthful. Hence, this submission of the learned A.P.P. will have to be rejected.

16. In the circumstances, we concur with the trial court that the prosecution has failed to make out its case against the accused. The view taken by the trial court is the only view which could have been taken on the evidence adduced by the prosecution. Hence, no interference is called for with the impugned judgment.

Appeal dismissed.

(SMT. RANJANA DESAI, J.)

(A.S. OKA, J.)